1960

Elmer Hanks v. Mark Christensen : Brief of Respondent

Utah Supreme Court

Morgan and Payne; Attorneys for Defendant-Respondent;

In the Supreme Court of the State of Utah

ELMER HANKS,
Plaintiff and Appellant,

vs.

MARK CHRISTENSEN,
Defendant and Respondent.

CASE
NO. 9190

RESPONDENT'S BRIEF

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Mark Christensen

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Plaintiff and defendant owned large tracts of uncleared land in the foothills of South Utah County for many years prior to 1958. Defendant in recent years had been clearing his land by fire and bulldozer to grow dry-land crops. He had constructed numerous fire-breaks at the request of the fire wardens around and criss-crossing his property (Tr. 373 to 379). On October 18, 1958, respondent burned some brush piles under a valid burning permit, the conditions of which he fully complied with. The fires were started completely surrounded by firebreaks in the early morning on a calm day (Tr. 383 to 388; 417 to 418). A small fire was noticed by respondent late in the afternoon North of Fire-

break E heading north down Snell Hollow toward appellant's land 100 rods away, which fire respondent and his wife were unable to control because of changeable gusts of wind (Tr. 389 to 392). When the fire flared in the wind endangering their lives, they went for help while the fire was still on respondent's ground and they got back with the fire department before the fire crossed over onto the lands of the appellant. The fire was driven down the slope by the wind onto appellant's lands and became so intense that the fire truck had to leave dragging its hoses (Tr. 392 to 397). The flames were 50 to 60 feet high and ash carried over half a mile by the strong wind (Tr. 399). The appellant's own expert witnesses—the Fire Wardens—testified that the permitted fire was put out of control by unusual, gusty-type winds that arose in the mid-afternoon and became even stronger bad winds later in the evening, forcing the fire downhill onto appellant's land and causing the fire to remain out of control even with fire-fighting equipment there (Tr. 185 to 188; 224 to 229). This was corroborated by respondent's witnesses and by respondent (Tr. 363 to 370; 403 to 405; 460 to 461).

After the fire the parties discussed the damage in the presence of the Fire Chief and respondent claimed the parties entered into an executory contract whereby respondent was to immediately reseed the range ground of appellant, rebuild fences and replace cedar posts with metal posts, reseed alfalfa damaged by bulldozer and allow appellant free grazing privileges until his own grazing lands were restored. Respondent did reseed appellant's burned ground by airplane and bought fence posts but appellant filed this suit for $23,000.00 damages and denied that any contract

was made. Even after suit the respondent tendered restoration to the appellant by completion of the alleged executory contract in his Answer but appellant refused to agree that any such contract existed and came into Court for money damages only (Tr. 415 to 416; 420 to 425).

STATEMENT OF POINTS

POINT I

THE TRIAL COURT DID NOT ERR IN ITS PROCEDURE WITH REGARD TO THE INSTRUCTING OF THE JURY.

POINT II

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT NEGLIGENCE IN THIS CASE IS "THE FAILURE TO USE ORDINARY AND REASONABLE CARE" AND THAT "ORDINARY CARE" WAS THE MEASURE OF CARE TO BE USED IN THIS CASE.

POINT III

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT THE DEFENDANT WAS NOT UNDER A DUTY TO ANTICIPATE AN UNUSUAL WIND AT THE TIME OF STARTING THE FIRE AND IF AN UNUSUAL AND UNEXPECTED HIGH WIND AROSE DURING THE PROGRESS OF THE FIRE AND CARRIED THE FIRE WHERE IT WOULD NOT HAVE OTHERWISE SPREAD, SUCH WIND CONSTITUTES AN INTERVENING CAUSE OF THE PLAINTIFF'S INJURY AND THE DEFENDANT WOULD BE RELIEVED OF LIABILITY FOR DAMAGE CAUSED THEREBY.

POINT IV

THE TRIAL COURT DID NOT ERR IN SUBMITTING THE SPECIAL INTERROGATORIES AS DRAWN TO THE JURY.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ITS PROCEDURE WITH REGARD TO THE INSTRUCTING OF THE JURY.

It is most apparent that it is the duty of the Court, not counsel, to instruct the jury and if the instructions are proper and correct in a jury trial, the procedure employed by the Court as to objections from counsel cannot be prejudicial to a party in the jury verdict. This is especially true when there is no objection in the record, as here—not one scintilla, by counsel for the appellant objecting to the Court's procedure.

All of the objections in Point I and Point II of Appellant's Brief relate to procedure in requesting proposed instructions and procedure in objecting to proposed instructions, all of which matters are improperly raised for the first time in Appellant's Brief. This appeal, at most, should turn on only Points III and IV of Appellant's Brief which relate to alleged faulty instructions. Said Points III and IV are answered in this Brief in Point II and III hereafter.

At the outset, respondent objects to appellant's version of what happened during the trial as to proposed instructions and objections to instructions. There is nothing in the record nor in this appeal, like affidavits or written or stated objections, except the bald statements by coun-

sel for appellant in his Brief as to what happened, and when, during the trial regarding improper procedure. Counsel for appellant does not say that he proffered his proposed instructions some time after the trial had begun and evidence received, as was the case. As counsel for respondent recall, the trial judge informed both counsel for appellant and for respondent what action was proposed on the instructions and on the issues of the case for the jury at least one day before the trial was concluded. The evidence and proof and the consequent issues were discussed by the trial judge with all counsel prior to the conclusion of the trial. Counsel for appellant received his copy of the Court's instructions at the same time that counsel for respondent did before the jury was instructed by the Court.

Counsel for appellant argued his case to the jury using the instructions for the basis thereof, as did counsel for respondent. Respondent and his counsel saw nothing irregular in the Court's procedure and no objections were made by them either. Objections should be timely raised by appellant so that counsel for respondent as well as the Court have an opportunity to correct any errors or possible errors. Appellant and his counsel were anxious and willing to have the case submitted to the jury, and made no objections to the Court or opposing counsel prior to the retiring of the jury to consider its verdict. The first inkling of claimed procedural irregularities appeared after the trial was over in appellant's Motion for New Trial.

Appellant's Brief in Point II continually repeats that counsel for appellant "had no opportunity to make objections" or "was not permitted" to do this or that. The record shows no such thing. The Court does not request ob-

jections. The record shows counsel for appellant had opportunity and did object often to items of evidence as they were given but he failed or made no attempt to speak up at any time about the conduct of the case and he never informed the Court during the trial of his disapproval of or his objections to the proceedings — not even when he took his objections to the instructions following the arguments to the jury (Tr. 467 to 470). However, **respondent's counsel** had time and opportunity (Tr. 467) to renew a motion for directed verdict to the Court prior to the instruction of the jury! The appellant had the same opportunity to speak as did respondent, but failed to do so or chose not to do so, and therefore has waived any objections. Obviously, appellant's objection now to the procedure of the Court is an afterthought to an adverse jury verdict.

Appellant's counsel would have the Supreme Court believe he was ignorant of the issues and evidence of the case until after the trial had been had. Lengthy depositions of the parties were taken by counsel on December 9, 1958, by Notice from appellant's counsel. A pretrial conference was held April 3, 1959, with all parties and counsel present wherein the facts and law were discussed and a Pretrial Order made by the Court.

Appellant's counsel is now standing for the proposition that it is improper to require proposed instructions to the jury until after all evidence is presented. The case of State Bank vs. Hollingshead, 82 U. 416, 25 P. 2nd 612, cited by appellant, holds that an instruction must be supported by evidence so that an instruction based on testimony **not in the record** is erroneous. But, appellant's pro-

posed corollary that instructions cannot be formulated or proposed, until all the evidence is taken, is false and contrary to Rule 51, U. C. A. 1953. Rule 51 also provides only a **privilege** that counsel **may** submit requested instructions. The rule puts the requirement on counsel to make objections to the instructions before the jury retires to consider its verdict. The Court in this case gave the instructions to the jury before arguments of counsel. Appellant has waived any alleged irregularities in procedure by failing to object thereto at the time.

Rule 46, U. C. A. 1953, requires a party to make known to the Court the action which he desires the Court to take or his objection thereto and his grounds therefor. This the appellant and his counsel did not attempt to do. Rule 46 does provide that failure to object is not prejudicial if a party has no opportunity to object to a ruling or order at the time it is made. In this case, however, appellant is not objecting to any ruling or order made by the Court!

Moore's Federal Practice, Vol. 5, pages 1903-4, covering said Rule 46, makes clear that a party must make it clear to the Court that he objects to the Court's action and to state his grounds therefor in order to allow the Court to obviate the defect if possible; also, that a point not raised and preserved below will not be considered on appeal unless it is a "fundamental error" like allowing interest on a claim in a Federal case contrary to applicable state law. At page 2503, and thereafter, of Vol. 5 of Moore's Federal Practice, covering Rule 51, most of the problems raised by appellant on procedure are answered. The party must object distinctly and with particularity to allow the trial judge to understand the party's position and to correct possible

errors; also, a general objection to a charge raises no issue and a party must particularize grounds of objection to preserve the right of appeal.

Rule 61, U. C. A. 1953, specifically declares that minor defects in the procedural acts or omissions of a court are harmless error. Respondents assert that there was no error in the procedure of this case, but that even if appellant's claims are true that it would have made no difference in the outcome of the case by the jury decision. Said Rule 61 is as follows:

> "No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceedings must disregard and error or defect in the proceeding which does not affect the substantial rights of the parties."

POINT II

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT NEGLIGENCE IN THIS CASE IS "THE FAILURE TO USE ORDINARY AND REASONABLE CARE" AND THAT "ORDINARY CARE" WAS THE MEASURE OF CARE TO BE USED IN THIS CASE.

An analysis of appellant's Brief and even the objections to the jury instructions discloses that the only two matters being considered on appeal are the standard of care for negligence (appellant's Point III) and the intervening

cause of the wind (appellant's Point IV). The only pertinent objections by the appellant (Tr. 467 to 470) are insufficient **general objections** that the instructions do not represent the evidence or law. This is improper objecting. Exceptions to jury instructions must be specific and to particular language or a portion thereof or to how it injuriously affects the rights of the party complaining. People vs. Berlin, 10 U. 39, 36 P. 199; Ryan vs. Beaver County, 82 U. 27, 21 P. 2nd 858, 89 A. L. R. 1253; Marks vs. Tompkins, 7 U. 421, 27 P. 6. An objection to an instruction which states that "on the ground and for the reasons that such instruction is not supported by, and is contrary to, the law and the evidence" does not comply with the requirements of (Rule 51). Employer's Mutual Liability Insurance Co. vs. Allen Oil Co., 123 U. 253, 258 P 2nd 445, 450.

On the merits of using the ordinary care standard of negligence by the Court in its instructions, it is obvious that the Court did not err in setting the standard of ordinary care, because this is the law. The case of Bushnell vs. Telluride Power Co., 145 Federal 2nd 950, cited by appellant is truly the leading case and it sets ordinary care as the standard in a fire damage case. It was a Utah case where defendant was held **negligent per se** for starting a fire on restricted lands (spread by a subsequent wind) without first obtaining a fire permit contrary (the same as at present) to the laws of Utah. However, the standard of care announced was that of ordinary care, citing Kendall vs. Fordham, 79 Utah 256, 9 P. 2nd 183. In the case at bar respondent Christensen had a valid fire permit (See Exhibit) and conformed to the requirements thereof: 1. Calm day (Tr. 224) 2. Cat standby (Tr. 402, 417) 3.

Notify fire departments (Tr. 418). There was no evidence to the contrary.

The Court should also note that appellant's own requested instructions, especially No. 10, ask for the ordinary care standard. The appellant would now ask this Court to find defendant-respondent negligent as a matter of law and complains that the lower court did not so instruct the jury! At best, it was a jury question if a conflict in the evidence existed, but the appellant did not even carry the burden of proof necessary to prove negligence under the circumstances. 24 ALR 2nd 254 to 259. Negligence cannot be presumed in a fire case where damage results. Kendall vs. Fordham, supra. Instruction No. 4 given by the Court defines negligence as the failure to do what an ordinary and reasonable person would have done **under the circumstances.** This is what the appellant's asked for! The items stated on Page 13 of appellant's Brief were contradicted in the evidence, were considered by the jury, but were not the proximate cause of the damage.

POINT III

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT THE DEFENDANT WAS NOT UNDER A DUTY TO ANTICIPATE AN UNUSUAL WIND AT THE TIME OF STARTING THE FIRE AND IF AN UNUSUAL AND UNEXPECTED HIGH WIND AROSE DURING THE PROGRESS OF THE FIRE AND CARRIED THE FIRE WHERE IT WOULD NOT HAVE OTHERWISE SPREAD, SUCH WIND CONSTITUTES AN INTERVENING CAUSE OF THE PLAINTIFF'S IN-

JURY AND THE DEFENDANT WOULD BE RELIEVED OF LIABILITY FOR DAMAGE CAUSED THEREBY.

The instruction on the wind as an intervening cause was taken almost verbatim from 22 Am. Jur. 624, Sec. 46 on Fires. See also 45 ALR 877, 24 ALR 2nd 271. This is the law and was supported by the evidence in this case. Appellant's own expert witnesses, the Fire Wardens, on cross-examination both gave their conclusive opinions that the cause of the fire getting out of control was the unusual, gusty-type, strong, stiff, erratic winds that unexpectedly arose in mid-afternoon while the fire was still well within respondent's lands (Tr. 185 to 188, 224, 227 to 229).

Instruction No. 12 by the Court about an intervening wind is the law as applied to this case. It is fully in accord with Bushnell vs. Telluride Power Co., supra, because this is not a case of statutory negligence per se as in the Bushnell case. The appellant would have this Court presume negligence on the defendant under this point as well. It should be noted, however, that the jury found specifically in the verdict that the defendant-respondent was **not negligent** in setting out the fires or tending the same, whereas said instruction No. 12 merely states that the defendant would be relieved of damages by a fire spread by an intervening cause of wind.

POINT IV

THE TRIAL COURT DID NOT ERR IN SUBMITTING THE SPECIAL INTERROGATORIES AS DRAWN TO THE JURY.

The appellant did not except to the special interrogatories in the verdict, either, and was perfectly willing at

the time that the case be committed to the jury under said instructions and said special verdict. It is interesting to note that the only objection made to the verdict as drawn, except the usual **general** objection made by appellant, was on the question as to whether there was a contract as alleged by the defendant to restore the plaintiff's property (Tr. 467 to 470). If that question were answered by the jury affirmatively, it put the plaintiff out of court as he denied any such contract which supplanted his claim for money damages. This was a proper and correct procedure by the Court. However, the jury found no contract, even though it had been partially performed by defendant-respondent, but the jury found instead on the other questions that the defendant was **not negligent** in either setting out the fires or in managing, controlling or tending the fires. The plaintiff just failed to prove negligence on the defendant. The plaintiff-appellant has not proved nor shown where the instructions were erroneous as to his case, either.

It was a long, expensive trial with much as stake for the defendant-respondent. Appellant unnecessarily ordered a 475 page transcript and referred to only a very few portions of it, as may be seen in his Brief, to further burden financially the respondent. The judgment on the verdict should be affirmed with costs to the respondent to avoid further litigation and expense.

Respectfully submitted,

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